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No. 99-____

IN THE
SUPREME COURT OF THE UNITED STATES

SONDRA SHEREN,

Petitioner,

v.

DAYTON HUDSON CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an employee asserting a claim under the Americans with Disability Act bear the burden of proving the existence and reasonableness of a proposed accommodation?

2. When an employee presents objective evidence that her performance as a salesperson was above average, may a district judge resolve a factual dispute on the employer's motion for summary judgment and find that the employee had been unable to perform her job?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sondra Sheren respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 18, 1999.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-2) and the opinion of the district court (App. 4-9) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 3) was entered on February 18, 1999.

STATUTE INVOLVED

This case involves the Americans with Disability Act, 42 U.S.C. §12101.

STATEMENT

In June of 1991, respondent hired petitioner as a sales associate in its furniture department at the Marshall Field's State Street store in Chicago, Illinois. Petitioner's duties included assisting customers with room plans, color schemes, showing them furniture, describing and demonstrating the features of individual pieces of furniture, going through fabric samples, coordinating orders between the initial sales order and the factory, and coordinating accessories, such as lamps, rugs, and tablecloths.

Petitioner's vision declined in the summer of 1995,[1] and

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1. Petitioner has significant visual impairments: she suffers from macular degeneration, has cataracts in each eye, is legally blind in her right eye and cannot see anything other than vague shadows with that eye. Plaintiff's visual condition is permanent, uncorrectable, and degenerative.

she began to have difficulty doing her job. Petitioner told Jack Sullivan, her department manager, "[t]hat my eyes had deteriorated and that I don't know if I could continue without some kind of assistance." Sullivan, who had never observed petitioner have any problem doing her job, directed petitioner to speak with Assistant Human Resources Manager Susan Varga.

Petitioner told Varga that "my vision had reached a point where I didn't know if I could continue in my job or if perhaps another job could be found for me." Varga subsequently gave petitioner disability forms to be completed by petitioner's physician.

Petitioner delivered her physician's form to Varga on August 22, 1995.[2] Petitioner also provided Varga with materials describing aids to assist the visually impaired. Varga requested information from petitioner's physician as to whether there was any medical procedure that would enable petitioner to see better. Thereafter, petitioner and Varga discussed alternative positions for petitioner.

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2. The form stated in pertinent part as follows:

> Patient has two problems (1) loss of vision (2) chronic vertigo. Can only see fingers at 1 [foot] in [right] eye and decreased vision in [left] eye from myopia and macular degeneration. She has significant problems with color differentiation, depth perception, and reading. Has difficulty with ambulation because of decrease in vision and vertigo.
>
> Patient legally blind in left eye and has significant uncorrectable vision in right eye with myopia and macular degeneration.

Petitioner continued to work as a sales associate through the summer of 1995 and did not experience any increased difficulties in working.

In mid-September of 1995, Varga told petitioner that she must go on short term disability leave. Petitioner responded that she wanted to continue to work. Varga told petitioner that the leave would begin the following Saturday, thereby permitting petitioner to continue to work until the end of the current sale. Varga also told petitioner that she would not be allowed to return for other sales.

Petitioner began her short-term disability leave in September of 1995 and promptly filed a charge of employment discrimination with the EEOC, alleging *inter alia* that she had been forced to go on disability leave because of her disability.

After discovery, respondent moved for summary judgment, conceding that petitioner was disabled, but asserting that "[n]o reasonable accommodation would have allowed Petitioner to continue working as a sales associate or in any other job." Petitioner opposed the motion, relying on the fact that she had been able to work productively as a sales associate even after requesting an accommodation. Petitioner relied on the deposition testimony of plaintiff's supervisor Jack Sullivan that he had:

> [N]ever observed plaintiff having trouble assisting customers on the sales floor; no one every told Sullivan that plaintiff was having trouble doing her job; Sullivan never observed plaintiff having trouble assisting customers and pointing out specific product features; no one ever told Sullivan that plaintiff was having trouble assisting customers and pointing out specific product features; Sullivan never observed plaintiff having difficulty performing accurate paperwork processing; no one ever told Sullivan that plaintiff was having trouble performing accurate paperwork processing; Sullivan

> never saw plaintiff having trouble in accurately processing point-of-sale transactions; no one ever told Sullivan that plaintiff was having trouble in accurately processing point-of-sale transactions.

Petitioner also pointed out that respondent had failed to come forward with any evidence to show that either of two proposed accommodations — installation of a magnification machine and keeping the store aisles clear of blockages — would have been unreasonable.

The district court granted respondent's motion for summary judgment, finding that "by the time [petitioner] requested [an accommodation,] her eyesight had already deteriorated to the point that she could not effectively perform her essential duties." (Pet.App. 6.) The district court characterized as "immaterial" petitioner's evidence that no one had ever observed her having trouble assisting customers, (Pet.App. 6), relying on petitioner's testimony that she had been having problems reading numbers in catalogs and on merchandise tags and because of statements from petitioner's physician that petitioner had "significant problems with color differentiation, depth perception, and reading." (Id.) The district court also relied on statements petitioner made in January of 1996 in a Social Security disability report.[3] (Pet.App. 6.)

The district court accepted respondent's assertions that the accommodations requested by petitioner were unreasonable. (Pet.App. 7-8.) Petitioner had argued that respondent had advanced these assertions without evidentiary support (Pet.App. 8), but the district court ruled that the absence of evidence was unimportant because petitioner bore the burden

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3. Petitioner had stopped working at Fields in September of 1995.

of proof on the reasonableness of the proposed accommodation. *(Id.)*

On appeal, petitioner argued *inter alia* that the district court had misallocated the burden of proof on petitioner's proposed accommodation and had erred in rejecting the proposed accommodation without the submission of evidence other than the arguments of respondent's counsel. The Seventh Circuit affirmed on the basis of the district court's opinion. (Pet.App. 1-2.)

REASONS FOR GRANTING THE WRIT

A. Burden of Proof of Accommodation

Under the Americans with Disability Act, discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such [employer]." 42 U.S.C. § 12112(b)(5)(A). There is a conflict among the circuits as to whether the burdens of production and persuasion on the issues of reasonable accommodation and undue burden are properly placed on the plaintiff or the defendant, or are divided between them.

The minority view, followed by the Seventh Circuit in this case (Pet.App. 8), is that the burden is on the employee to prove the existence and reasonableness of the proposed accommodation. This is the rule in the Eleventh Circuit and in the District of Columbia Circuit. *Barth v. Gelb,* 2 F.3d 1180, 1186 (D.C.Cir. 1993); *Carr v. Reno,* 23 F.3d 525, 529 (D.C.Cir. 1994); *Taylor v. Food World, Inc.,* 133 F.3d 1419, 1425 (11th Cir. 1998); *Willis v. Conopco,* 108 F.3d 272 (11th Cir. 1997).

The courts of appeals for the Second, Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuit have followed the analysis of *Borkowski v. Valley Cent. School Dist.,* 63 F.3d 131, 138

(2d Cir. 1995) that once the disabled employee proposes an accommodation that is objectively reasonable, the employer bears the burden of proving that the proposed accommodation is unreasonable or would cause an undue hardship on the the employer. *See, e.g., Walton v. Mental Health Association of Southeastern Pennsylvania,* 168 F.3d 661, 670 (3d Cir. 1999); *Riel v. Electronic Data Sys. Corp.,* 99 F.3d 678, 682 (5th Cir. 1996) *Cehrs v. Northeast Ohio Alzheimer's Research Center,* 155 F.3d 775, 781 (6th Cir. 1998); *Benson v. Northwest Airlines, Inc.,* 62 F.3d 1108, 1112 (8th Cir. 1995) *Zukle v. Regents of the University of California,* 166 F.3d 1041, 1048 (9th Cir. 1999); *Woodman v. Runyon,* 132 F.3d 1330, 1344 (10th Cir. 1997)

In this case, petitioner suggested to her employer that installation of a stationary high powered magnification machine would allow her to continue to work as a salesperson. Respondent did not come forward with any evidence to the contrary, and conceded that at the time petitioner requested an accommodation, she had been performing at an average or above average level. Nonetheless, the district court concluded that petitioner had failed to meet her burden of proving that the proposed accommodation was reasonable and would not impose an undue hardship. (Pet.App. 8.)

Petitioner's claim would have proceeded to trial in at least six circuits, but in three circuits, including the Seventh Circuit, plaintiff's claim could not survive summary judgment. Certiorari should be granted to resolve this conflict.

B. Summary Judgment

Petitioner presented objective evidence that her performance as a salesperson was above average and pointed out that her supervisor had neither observed her having trouble assisting customers nor had received any complaints about her performance. (Pet.App. 6.) In the view of the district court, this evidence was "immaterial" because petitioner had requested an accommodation for her vision problems. (Id.)

In *Hunt v. Cromartie*, ___ U.S. ___ (No. 98-85, May 17, 1999), this Court reminded the lower federal courts that disputed facts should not be resolved at the summary judgment stage. This is precisely the vice of the district court opinion, which contains findings on disputed issues — "I find that . . . by the time [petitioner] requested [an accommodation] her eyesight had already deteriorated to the point that she could not effectively perform her essential duties." (Pet.App. 6.) Similarly, even though petitioner was making furniture sales up to the time respondent forced her to stop working, and absent any evidence to the contrary, the district court found that petitioner "could not effectively assist customers in selecting furniture, fabrics, and accessories as required of a furniture sales associate." (Id.) The Court should correct this erroneous resolution of disputed questions of fact at the summary judgment stage.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

May, 1999

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